AUTHORITY CITED

CASE	PAGE
Foulger v. McGrath, 34 Utah 86, 95 Pac. 1004	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 899.

WUNDERLICH CONTRACTING COMPANY, a corporation; CURLETT CONSTRUCTION COMPANY, a corporation; and CHAS. H. TOMPKINS CO., a corporation, doing business as a joint venture under the name of WUNDERLICH, CURLETT & TOMPKINS; NATIONAL SURETY CORPORATION, a corporation; CONTINENTAL CASUALTY COMPANY, a corporation; THE TRAVELERS INDEMNITY COMPANY, a corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA *ex rel.* REISCHEL & COTTRELL, a California corporation; and MARTIN BROS., a co-partnership consisting of W. L. MARTIN and JOHN MARTIN, doing business as a joint venture under the name of REISCHEL & COTTRELL-MARTIN BROS.,

Respondents.

OPPOSING BRIEF OF RESPONDENTS.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents herein, Reischel & Cottrell and Martin Bros., respectfully pray that the petition for writ of certiorari by the petitioners herein be denied.

It appears to respondents that the petitioners in their petition, as they did in their petition for rehearing before the Circuit Court of Appeals, are making every effort to obtain an opinion which will indicate that the contract between themselves and the Government was abandoned.

Neither in the decision of the District Court nor in the opinion of the Circuit Court of Appeals is there the slightest intimation that the prime contract between the Government and the petitioners herein was abandoned. This question was not before the court and was not necessary to the decision. Yet petitioners make the statements no less than fifteen times that the *prime* contract was abandoned and that the plans and specifications were furnished subcontractor by the Government.

The basis of the decision of the District Court and of the opinion by the Circuit Court of Appeals is not that which petitioners set forth. Neither the record nor the opinion of the Circuit Court of Appeals supports the conclusion of petitioners that the plans and specifications were presented to respondent subcontractors by the Government. The plans and specifications, which were presented to the respondents, were those furnished to the subcontractors by the petitioners, and the changes which were made, resulting in an abandonment of the *subcontract,* were, insofar as the subcontractors are concerned, changes of the petitioners, the prime contractor.

Further, the "questions presented" by petitioners would appear to be the facts of an entirely different case from that which went to trial. A truer picture of the facts of this case would be contained in a question such as this: Is a subcontractor entitled to recover under an implied contract from the prime contractor who required him to furnish materials and services, entirely different in time and labor and amount of materials from those contemplated by the parties at the time the subcontractor bid on the job and signed the subcontract, and where the changes from the plans and specifications bid upon are so extensive as to constitute completely new and different plans and

specifications and such changes take place piecemeal, so that the cumulative effect of all the changes was not cognizable until completion of the construction?

The Miller Act bond is for the protection of materialmen and laborers and not for the benefit of the prime contractor, and there is no necessity that a written *subcontract* be entered into in order for a laborer or materialman to sue on the bond. In the instant case the bond was written for the purpose of protecting laborers and materialmen who furnished services and materials in the construction of a 500-bed Veterans Administration hospital in Salt Lake City. The respondent subcontractors herein performed their services and furnished their materials for a 500-bed Veterans Administration hospital in Salt Lake City.

Petitioners also would have this Honorable Court believe that the court below and the Circuit Court of Appeals based their determination of "reasonable value" solely upon the total costs of the subcontractors, plus overhead and profit. This was but a portion of the evidence taken into consideration bearing on the question of "reasonable value." The testimony of petitioners' own witnesses that the charges were reasonable and the fact that the petitioners filed claims with the Government for identical sums, and added thereto a profit and overhead expense of their own, were some of the other factors taken into consideration in arriving at "reasonable value."

Petitioners cite as authority for eliminating profits from the reasonable value of services the case of *Foulger v. McGrath,* 34 Utah 86, 95 Pac. 1004, but that case does not support petitioners' conclusion. In the cited case the contractor sought to recover on *quantum meruit* in addition to the profit he would have received under the contract,

and there is nothing in the cited case to indicate that evidence of overhead and profit is inadmissible on the question of "reasonable value."

In conclusion, may we say that the questions involved in this case are purely academic and episodic and do not involve important questions of Federal law which have not been settled by the Supreme Court. The decision is primarily a factual one, but it will, respondents hope, prevent prime contractors from operating under the illusion that they are merely brokers between materialmen and subcontractors and the owner, and not responsible to their subs for their own carelessness, negligence and the representations made to a subcontractor when the prime is requesting a bid.

Respectfully submitted,

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LEWIS C. TEEGARDEN,

Counsel for Respondents.